IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33958

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 611**
	)	
Plaintiff-Respondent,	)	**Filed: September 17, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
SHAWN ALAN LASH,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Judgment of conviction for three counts of lewd conduct with a minor and three counts of sexual battery of a minor, and concurrent unified life sentences with twenty-five years determinate, affirmed.

Dennis Benjamin of Nevin, Benjamin, McKay & Bartlett, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Shawn Alan Lash appeals from his convictions for three counts of lewd conduct with a minor under sixteen and three counts of sexual battery of a minor child sixteen or seventeen years of age. Lash contends that the district court erred by relying on the contents of a psychosexual evaluation after previously agreeing not to consider it. He also contends that his six concurrent, unified sentences of life, with twenty-five years fixed are excessive. We affirm.

I.
FACTS AND PROCEDURE

Lash was tried on three counts of lewd conduct with a minor under sixteen, Idaho Code § 18-1508, for sexual contact with his stepdaughter, M.W., three counts of lewd conduct with a minor under sixteen, for sexual contact with his biological daughter, K.L., and three counts of sexual battery of a minor child sixteen or seventeen years of age, I.C. § 18-1508A(1)(a), for

sexual contact with his biological daughter K.L. A jury found him not guilty of the charges as to M.W., but guilty of all six charges in which K.L. was the victim.

The district court ordered the preparation of a psychosexual evaluation for sentencing purposes, and Lash participated in that evaluation, which was conducted by Dr. Engle. After the evaluation report was prepared and sent to the parties and the court, Lash moved for a second evaluation. At a hearing, the district court authorized a second evaluation and also agreed not to consider the first evaluation at sentencing in light of the Idaho Supreme Court's just-issued decision in *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006).

At the sentencing hearing, the district court made mention of the first evaluation, to which Lash did not object. The court imposed six concurrent, unified life sentences, with twenty-five years determinate. Lash appeals, contending that the district court violated his Fifth and Sixth Amendment rights, as they were defined in *Estrada*, by considering the first psychosexual evaluation during sentencing.

II.

ANALYSIS

A. The *Estrada* Sentencing Issue

In *Estrada*, the Idaho Supreme Court held that the constitutional right against self-incrimination extends to participation in a psychosexual evaluation for sentencing purposes and that defense counsel can be held ineffective for failing to inform a defendant of that right before the defendant participates in a psychosexual evaluation. *Id.* at 561-64, 149 P.3d at 836-39. In this appeal, Lash contends that his first psychosexual evaluation, performed by Dr. Engle, was conducted in violation of *Estrada* and that the district court thus violated his constitutional rights by considering the evaluation at sentencing. He seeks resentencing before a different district court judge.

We find Lash's argument unpersuasive for two reasons. First, the record does not show that the district court actually considered the first psychosexual evaluation in imposing sentence. Second, assuming that the district court did consider Dr. Engle's report in fashioning Lash's sentence, Lash's failure to object to that consideration at the sentencing hearing, or thereafter in the district court, and his failure to establish an *Estrada* violation in support of such an objection, precludes any finding of error.

First, we conclude that the district court did not actually "consider" the first evaluation for sentencing purposes, in the manner that Lash contends. The district court's statements at the sentencing hearing can be properly understood only if they are considered in the full context. At trial Lash had testified, denying that he committed any of the acts with which he was charged. During Dr. Engle's evaluation, Lash continued to deny guilt, and this denial, and Lash's consequent lack of amenability to treatment, contributed to findings by Dr. Engle that were unfavorable to Lash. One of Dr. Engle's conclusions stated, "The Examiner expresses, based upon all of the information gathered in the present evaluation, that Mr. Lash falls at the "high" probability to commit a sexual offense in the foreseeable future similar to the instant offense *if he continues to deny that the sexual offense occurred*. . . ." By the time of the hearing on his motion for a second psychosexual evaluation, however, Lash admitted the offenses against K.L. He also made such admissions to the second psychosexual evaluator. Thereafter, at the sentencing hearing, the district court said:

> This case is probably the most egregious child abuse case that I've heard in my six-plus years as a district court judge.
>
> One of the things I've had difficulty in determining is just how to weigh the fact that Mr. Lash confessed at our last hearing and what might have motivated him to do that.
>
> He's the only one that really knows why he chose to do that. The psychosexual evaluation indicates that he's manipulative and deceitful. I think that the argument could be made that he did that because all else had failed him in terms of getting [K.L.] to recant. She stood her ground.
>
> He came back with a rather poor psychosexual evaluation from Dr. Engle indicating that he is a pedophile and at high risk to reoffend.
>
> It can be reasonable to believe that he chose to make that confession because he thought that that might help him in terms of sentencing. It's also reasonable that he's come to grips with what he is and what he did to his daughter and sees himself, perhaps, in a more realistic light as being a child molester, that this is something he needed to do was to confess.

Thereafter, without attempting to resolve the question of Lash's motivation in confessing, the district court deemed it "a positive thing that he did," which benefited his daughter and other members of the family. In this context, it is apparent that the court's reference to Dr. Engle's evaluation was only to cite it as a factor that may have led Lash to conclude that it would be in his best interest to confess. The comment does not indicate that the district court considered the substance of Dr. Engle's opinion in fashioning Lash's sentence.

Even assuming, however, that the district court *did* rely on Dr. Engle's evaluation at sentencing, we will not further consider the alleged error because Lash did not preserve the issue for appeal by objecting in the district court at sentencing or thereafter. *See State v. Gray*, 129 Idaho 784, 794, 932 P.2d 907, 917 (Ct. App. 1997). Even though there was no need for Lash to initially move to suppress Dr. Engle's evaluation in light of the district court's sua sponte promise not to consider it, once the district court did allegedly consider that evaluation at sentencing, Lash was on notice of the need to make an objection and demonstrate that the evaluation must be suppressed because it was conducted in violation of his Fifth and Sixth Amendment rights. Lash did not do so.

Lash contends that this Court should nevertheless consider the issue as a matter of fundamental error. A definition of fundamental error in Idaho is expressed in *State v. Sarabia*, 125 Idaho 815, 818, 875 P.2d 227, 230 (1994) (quoting *State v. Knowlton*, 123 Idaho 916, 918, 854 P.2d 259, 261 (1993)):

> Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

The fundamental error doctrine is premised on the trial court's obligation to see that a defendant receives a fair trial, *State v. Lewis*, 126 Idaho 77, 80-81, 878 P.2d 776, 779-80 (1994); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971), and is intended to remedy situations where an alleged error may have deprived the defendant of his or her constitutional right to a fair proceeding. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003); *State v. Reynolds*, 120 Idaho 445, 448, 816 P.2d 1002, 1005 (Ct. App. 1991). Thus, we will not review, as fundamental error, Lash's claim that the district court erred by considering the first psychosexual evaluation merely because it had agreed not to do so, without a demonstration that a constitutional violation actually occurred. To demonstrate fundamental error, the record must sufficiently establish that an *Estrada* violation was committed. *State v. Lenon*, 143 Idaho 415, 417-18, 146 P.3d 681, 683-84, (Ct. App. 2005); *State v. Wills*, 140 Idaho 773, 775, 102 P.3d 380, 382 (Ct. App. 2004); *State v. Jones*, 139 Idaho 299, 301, 77 P.3d 988, 990 (Ct. App. 2003); *State v. Kellis*, 129 Idaho 730, 733-34, 932 P.2d 358, 361-62 (Ct. App. 1997).

The record here does not disclose whether Lash was informed of his right against self-incrimination, by his counsel or in any other manner, prior to his participation in the first

psychosexual evaluation. Therefore, the record is insufficient to establish that any error, fundamental or otherwise, occurred.

B. Excessive Sentences

Lash next contends that his six concurrent, unified sentences of life with twenty-five years determinate are excessive.

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992). In evaluating the reasonableness of a sentence, we consider the nature of the offense and the character of the offender, applying our well-established standards of review. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The district court stated that "[t]his case is probably the most egregious child abuse case that I've heard in my six-plus years as a district court judge." The record supports the district court's conclusion that Lash's conduct was egregious. Lash repeatedly sexually molested his biological daughter, beginning with touching when she was ten years old and proceeding to sexual intercourse when she was twelve, which intercourse occurred multiple times weekly in the family home and elsewhere for six years. According to the victim, Lash videotaped many of the abuses and the two watched the recordings together. Child pornography, with images of early-teen and pre-teen girls, was found on Lash's computers. The record supports the district court's conclusions that Lash is a pedophile and that he is a risk to reoffend if given the opportunity to do so. Lash has not shown an abuse of discretion in the sentences imposed.

III.
CONCLUSION

The judgment of conviction and sentences are affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**